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Public Prosecutor v Sah Chin Chong

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05(SH)-309–08 OF 2016
MOHTARUDIN BAKI, IDRUS HARUN AND ABDUL KARIM JJCA
1 JUNE 2018

C *Criminal Law — Murder — Grave and sudden provocation — Whether trial court's failure to properly scrutinise evidence resulted in wrong finding that accused had established defence of grave and sudden provocation — Whether accused's defence riddled with inconsistencies and had to be rejected — Whether accused did not offer any evidence to support allegation that he was gravely provoked* D *— Whether accused's defence a mere denial which failed to cast reasonable doubt in prosecution's case*

The respondent ('the accused') was charged in the High Court with murdering a man ('Chow') and for voluntarily causing hurt to another person ('Wong') E with a pair of scissors pursuant, respectively, to ss 302 and 324 of the Penal Code. After a trial of both the charges, the Court found the accused guilty of lesser offences than the ones he was charged with. He was sentenced to 18 months' jail for committing culpable homicide not amounting to murder (s 304(a)) and to a month's jail for voluntarily causing hurt on grave and sudden F provocation (s 334). The prosecution appealed against the whole decision. According to the prosecution's evidence, police, on being informed that a fight and a stabbing had taken place, rushed to the scene of the crime and found Chow lying dead in a pool of blood on the road in front of an amusement centre and the accused standing nearby, his clothes and hands covered in blood. G Police recovered a blood-stained pair of scissors from the accused. Wong had suffered stab wounds to his hand and leg. A post mortem revealed that Chow had died of a stab wound to the chest which severed his right lung and liver. There was no eye-witness to the killing. In statements recorded from Wong and another man ('Tham') under s 112 of the Criminal Procedure Code, and which H were admitted in evidence at the trial as neither of them could be located, Wong and Tham said they were working in the amusement centre at the material time when the accused came and said he wanted to apprehend a customer. He left when Wong told him to do so but returned and punched Wong and stabbed him with a pair of scissors. Chow tried to stop the fight but I the accused turned upon Chow and was seen chasing Chow out of the amusement centre. Thereafter, Wong and Tham said they saw Chow lying on the road outside in a pool of blood and the accused standing nearby holding a bloodied pair of scissors. In his defence to the original charges, the accused claimed he was provoked into attacking Wong and the deceased when they

warned him that if he did not return money he had allegedly stolen from the amusement centre they would harm members of his family. The accused claimed that although he attacked Wong and the deceased, he could not recollect what exactly took place. A psychiatrist ('DW2'), called as a witness for the defence, testified that the accused suffered from intellectual incapacity or deficiency which could cause him to behave irrationally and uncontrollably if he was provoked. The trial judge accepted the accused's defence of grave and sudden provocation and found him guilty on the lesser offences.

Held, allowing the appeal, setting aside the decision of the High Court, finding the accused guilty on the original charge of murder and sentencing him to death:

(1) The trial court's grounds of judgment and record of proceedings did not indicate that it had undertaken a proper, adequate and correct judicial appreciation and scrutiny of the entire evidence on the issue of provocation to ascertain the truth of the matter. Had the trial judge scrutinised the evidence, he would have found that the defence of provocation was riddled with serious discrepancies and was lost in a morass of contradictions and ambiguities without a scintilla of truth (see paras 30–31).

(2) The accused initially testified that both the deceased and Wong had used provocative words. Later, he did an about-turn and said it was the deceased who had uttered those words. The accused did not explain his change of stance. Both the deceased and Wong could not have said the same thing or used the same words simultaneously. Or did they use the same words at different times? The court could not hazard a guess on the manner in which the alleged provocative words were uttered and by whom. What the accused said in his cautioned statement regarding the alleged provocative words further contradicted what he had said in court. The accused's defence was not supported by any other evidence. It was insufficient to rely on his words which were full of irreconcilable inconsistencies. It was wholly unsafe to act on the accused's evidence and hold that there was provocation that emanated from Wong and the deceased. In the circumstances, it was appropriate to conclude that the trial judge erred in misapprehending the law and material evidence in finding that the accused had acted on the provocation of Wong and the deceased. On balance of probabilities, the defence had failed to prove provocation (see paras 28, 31–32 & 34).

(3) The trial judge had correctly admitted into evidence the statements of Wong and Tham. He found their statements to be truthful and consistent with the other proven facts. The statements of Wong and Tham did not contain a scrap of evidence about the provocation alleged by the accused. Even though Wong and Tham were not cross-examined

on the issue of provocation, as they could not be traced, the court noted that the defence did not cross-examine the investigation officer, PW11, on the said issue (see paras 33 & 35).

(4) The circumstantial evidence proved conclusively that the accused had inflicted the fatal injury on the deceased. From the nature of the injuries, the accused must have intended to inflict such bodily injury on the deceased which was sufficient in the ordinary course of nature to cause death. The accused's act fell squarely within limb (c) of s 300 of the Penal Code (see paras 37–38).

(5) The accused's defence was a complete denial of the killing. In his oral testimony, he denied knowledge that he had killed the deceased. But in his cautioned statement he admitted to stabbing the deceased. His denial was insufficient to secure an acquittal in the absence of any evidence to explain or justify his denial. A mere denial was insufficient to cast a reasonable doubt in the prosecution's case. The accused's denial and defence had to be dismissed as a mere afterthought. It was more probable that he had deliberately stabbed the deceased to cause his death. The prosecution had proven the murder charge beyond reasonable doubt (see paras 39–41).

(6) Since the prosecution had only argued the appeal in respect of the murder charge, it had to be assumed that it had abandoned the appeal against the reduction in the 'voluntarily causing hurt' charge (see para 20).

[Bahasa Malaysia summary

Responden ('tertuduh') dituduh di Mahkamah Tinggi dengan membunuh seorang lelaki ('Chow') dan kerana secara sukarela menyebabkan kecederaan kepada seorang yang lain ('Wong') dengan gunting masing-masing berikutan kepada ss 302 dan 324 Kanun Keseksaan. Selepas perbicaraan kedua-dua tuduhan, mahkamah mendapati tertuduh bersalah terhadap kesalahan yang lebih rendah daripada yang dia didakwa. Dia dihukum penjara 18 bulan kerana membunuh orang dengan salah bukan merupakan pembunuhan (s 304(a)) dan sebulan penjara kerana secara sukarela menyebabkan kecederaan atas bangkitan marah besar dan mengejut (s 334). Pihak pendakwaan merayu terhadap keputusan keseluruhan. Mengikut keterangan pihak pendakwaan, polis, apabila diberitahu bahawa pergaduhan dan tikaman telah berlaku, bergegas ke tempat kejadian dan mendapati Chow terbaring mati berlumuran darah di atas jalan di hadapan pusat hiburan dan tertuduh berdiri berdekatan, baju dan tangannya diliputi darah. Polis menemui gunting berlumuran darah daripada tertuduh. Wong telah mengalami luka tikaman kepada tangan dan kakinya. Autopsi menunjukkan bahawa Chow telah mati akibat luka tikaman di dada yang memutuskan paru-paru dan hatinya. Tidak terdapat saksi kepada pembunuhan tersebut. Dalam penyataan yang direkodkan daripada Wong dan seorang yang lain ('Tham') di bawah s 112 Kanun Tatacara Jenayah, dan yang

mana dimasukkan sebagai keterangan pada perbicaraan kerana mereka berdua tidak dapat dijumpai, Wong dan Tham menyatakan mereka sedang bekerja di pusat hiburan pada masa material apabila tertuduh menyatakan dia datang untuk menangkap pelanggan. Dia meninggalkan tempat apabila dia diberitahu berbuat sedemikian tetapi kembali ke tempat tersebut dan menumbuk Wong dan menikamnya dengan gunting. Chow cuba untuk memberhentikan pergaduhan tersebut tetapi tertuduh berpaling kepada Chow dan dilihat mengejar Chow keluar daripada pusat hiburan tersebut. Selepas itu, Wong dan Tham menyatakan mereka melihat Chow terbaring di atas jalan luar berlumuran darah dan tertuduh berdiri berdekatan memegang gunting yang berdarah. Dalam pembelaannya kepada tuduhan asal, tertuduh mendakwa dia diransangkan dalam menyerang Wong dan si mati apabila mereka memberi amaran kepadanya jika dia tidak memulang wang yang dia didtuduh mencuri daripada pusat hiburan mereka akan mencederakan ahli keluarganya. Tertuduh mendakwa bahawa walaupun dia menyerang Wong dan si mati, dia tidak dapat mengingati apa yang berlaku sebenarnya. Psikiatri ('DW2'), memanggil saksi untuk pembelaan, memberi keterangan bahawa tertuduh mengalami ketidakupayaan intelektual atau kekurangan yang boleh menyebabkan dia untuk berkelakuan tidak rasional dan tidak dapat dikawal jika dia diransangkan. Hakim perbicaraan menerima pembelaan bangkitan marah besar dan mengejut dan mendapati dia bersalah atas tuduhan yang lebih rendah.

Diputuskan, membenarkan rayuan, mengenepikan keputusan Mahkamah Tinggi, mendapati tertuduh bersalah atas tuduhan bunuh asal dan menjatuhkan ke atasnya hukuman mati:

(1) Alasan penghakiman mahkamah perbicaraan dan rekod prosiding tidak menunjukkan bahawa ia telah mengambil kira penilaian kehakiman yang wajar, mencukupi dan betul dan ketelitian keseluruhan keterangan atas isu provokasi untuk menentukan kebenaran perkara. Sekiranya hakim perbicaraan meneliti keterangan tersebut, beliau akan mendapati bahawa pembelaan provokasi adalah penuh dengan perselisihan serius dan hilang dalam kekusutan percanggahan dan kekaburan tanpa sedikit pun kebenarannya (lihat perenggan 30–31).

(2) Tertuduh pada mulanya memberi keterangan bahawa kedua-dua si mati dan Wong telah menggunakan perkataan-perkataan provokatif. Kemudiannya, dia mengubah haluan dan menyatakan bahawa si mati yang menyebut perkataan-perkataan tersebut. Tertuduh tidak menjelaskan perubahan pendiriannya. Kedua-dua si mati dan Wong tidak mungkin menyatakan yang sama atau menggunakan perkataan-perkataan yang sama secara serentak. Atau mereka menggunakan perkataan-perkataan yang sama pada masa berbeza? Mahkamah tidak dapat menimbulkan teka-teki atas cara di mana perkataan-perkataan provokatif yang didakwa disebut dan oleh siapa.

Apa yang dikatakan oleh tertuduh dalam penyataan amarannya berkaitan perkataan-perkataan provokatif yang didakwa tersebut selanjutnya bercanggah dengan apa yang dia nyatakan di mahkamah. Pembelaan tertuduh tidak disokong oleh apa-apa keterangan lain. Ia adalah tidak mencukupi untuk bergantung atas perkataan-perkataannya yang mana adalah tidak konsisten yang tidak boleh dipertikaikan. Ia adalah tidak selamat untuk bertindak atas keterangan tertuduh dan memutuskan bahawa terdapat provokasi yang berasal daripada Wong dan si mati. Dalam keadaan, adalah wajar untuk memutuskan bahawa hakim perbicaraan tersilap dalam mentafsirkan undang-undang dan keterangan material dalam mendapati bahawa tertuduh telah bertindak atas provokasi Wong dan si mati. Atas imbangan kebarangkalian, pembelaan telah gagal untuk membuktikan provokasi (lihat perenggan 28, 31–32 & 34).

(3) Hakim perbicaraan telah secara betul memasukkan dalam keterangan penyataan Wong dan Tham. Beliau mendapati penyataan mereka adalah betul dan konsisten dengan fakta lain yang dibuktikan. Penyataan Wong dan Tham tidak mengandungi sedikit keterangan mengenai provokasi yang didakwa oleh tertuduh. Walaupun Wong dan Tham tidak diperiksa balas atas isu provokasi, kerana mereka tidak dapat dikesan, mahkamah mengambil perhatian bahawa pembelaan tidak memeriksa balas pegawai penyiasat, PW11, atas isu tersebut (lihat perenggan 33 & 35).

(4) Keterangan keadaan membuktikan secara konklusif bahawa tertuduh telah menyebabkan kecederaan maut ke atas si mati. Daripada sifat kecederaan tersebut, tertuduh mestilah berniat untuk menyebabkan kecederaan badan sedemikian ke atas si mati yang mana mencukupi dalam perjalanan biasa sifat untuk menyebabkan kematian. Tindakan tertuduh terangkum tepat dalam bahagian (c) s 300 Kanun Keseksaan (lihat perenggan 37–38).

(5) Pembelaan tertuduh adalah penafian lengkap terhadap pembunuhan tersebut. Dalam keterangan lisannya, dia menafikan pengetahuan bahawa dia telah membunuh si mati. Tetapi dalam penyataan beramarannya dia mengaku menikam si mati. Penafiannya adalah tidak mencukupi untuk mendapatkan pembebasan dalam ketiadaan apa-apa keterangan untuk menjelaskan atau menjustifikasikan penafiannya. Penafian semata-mata tidak mencukupi untuk melemparkan keraguan munasabah dalam kes pendakwaan. Penafian dan pembelaan tertuduh perlu ditolak sebagai semata-mata sesuatu yang difikirkan kemudian. Ia adalah lebih berkemungkinan yang dia secara sengaja menikam si mati untuk menyebabkan kematiannya. Pihak pendakwaan telah membuktikan tuduhan bunuh melampaui keraguan munasabah (lihat perenggan 39–41).

(6) Memandangkan pihak pendakwaan hanya berhujah ke atas rayuan

tersebut berkaitan tuduhan bunuh, ia perlu dianggap bahawa ia telah meninggalkan rayuan terhadap pengurangan tuduhan 'voluntarily causing hurt' (lihat perenggan 20).]

Notes

For cases on murder in general, see 4(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1847–1993.

Cases referred to

Akin Khan bin Abdul Rahman v PP [1987] 2 MLJ 217, SC (refd)
Da Duncan v PP [1980] 2 MLJ 195, FC (refd)
Dato' Yap Peng v PP [1993] 1 MLJ 337, HC (refd)
Lee Chin Hock v PP [1972] 2 MLJ 30, FC (refd)
Lee Thian Beng v PP [1972] 1 MLJ 248, FC (refd)
Loo Hwee Hong v PP [1978] 2 MLJ 164 (refd)
Looi Wooi Saik v PP [1962] 1 MLJ 337, CA (refd)
Madhavan v State of Kerala AIR 1966 Ker 258; 1966 Ker LT 112, HC (refd)
Nasaruddin bin Daud & Anor v PP and another appeal [2010] 6 MLJ 35; [2010] 8 CLJ 21, CA (refd)
Pendakwa Raya lwn Mr Losali dan satu lagi dan rayuan lain [2009] 6 MLJ 54; [2010] 8 CLJ 560, CA (refd)
PP v Awang Raduan bin Awang Bol [1998] 5 MLJ 460, HC (refd)
PP v Lee Poh Chye & Anor [1997] 4 MLJ 578, HC (refd)
PP v Munusamy [1980] 2 MLJ 133, FC (refd)
PP v Vijaya Raj [1981] 1 MLJ 43 (refd)
R v Hayward (1833) 6 C & P 157 (refd)
Tan Buck Tee v PP [1961] 1 MLJ 176, CA (consd)
Timhar Jimdani Ong & Anor v PP [2010] 1 MLJ 775; [2010] 3 CLJ 938, CA (refd)

Legislation referred to

Criminal Procedure Code s 112, 112(iv)
Evidence Act 1950 ss 32, 32(1)(i), 105
Penal Code ss 300, 300(c), 302, 304(a), 324, 334, Chapter IV

Appeal from: Criminal Trial No 45B-32–05 of 2013 and 45ors-33–05 of 2013 (High Court, Muar)

Tengku Intan Suraya bt Tengku Ismail (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Gobind Singh Deo (Mohd Haijan bin Omar with him) (Gobind Singh Deo & Co) for the respondent.

Idrus Harun JCA:

[1] The accused ('the respondent') was charged in the High Court at the instance of the public prosecutor ('the appellant') with one separate count of murder under s 302 of the Penal Code and one count of voluntarily causing hurt by dangerous weapon under s 324 of the same Code. On the charge of murder, the learned trial judge, at the end of the defence, convicted the respondent under s 304(a) of the Penal Code and sentenced him to 18 years of imprisonment with effect from the date of his arrest. So far as it relates to the charge under s 324 of the Penal Code, the learned judge reduced the said charge to one under s 334 thereof to which His Lordship consequently found the respondent guilty and sentenced him to one month imprisonment. Both sentences were ordered to run consecutively.

[2] The appeal by the appellant before this court is against the orders of such convictions and sentences. We shall now set out the charges upon which the appellant was convicted and sentenced as aforementioned:

> First Charge
>
> Bahawa kamu pada 19.2.2013, di antara jam lebih kurang 4.00 petang sehingga jam lebih kurang 5.30 petang, bertempat di sekitar Jalan Langsat, bersebelahan pusat membeli belah Song Mart, di dalam daerah Kluang, di dalam negeri Johor, telah melakukan kesalahan membunuh dengan menyebabkan kematian ke atas Chow Chin Wei (No KPT: 761112-01-6805), dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.
>
> Second Charge
>
> Bahawa kamu pada 19.2.2013, di antara jam lebih kurang 4.00 petang sehingga jam lebih kurang 5.30 petang, bertempat di alamat Lot 13A, 13B, 18 pusat membeli belah Song Mart, Jalan Duku, Kluang di dalam daerah Kluang, di dalam Negeri Johor telah dengan sengaja menyebabkan kecederaan ke atas Wong Ren Kect, KPT: 861107-23-5497 menggunakan gunting dan oleh yang demikian kamu melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 324 Kanun Keseksaan.

[3] The material facts garnered from the evidence led by the prosecution reveal that Chow Chin Wei aka Fei Mao (the deceased) worked at an indoor amusement centre by the name of Super Game located at Song Mart Supermarket. Ong Wei Khang ('PW12') who also worked at the said amusement centre heard a commotion there caused by some people who were involved in a fight. But he could not see who were involved in the fight as he was busy with his work and besides there were many customers inside the premises playing computer games. These customers ran out of the premises followed by PW12. Whilst outside the premises, PW12 saw the deceased already dead on the road.

[4] ASP Ashmon bin Bajah ('PW6'), upon being informed by Lance Corporal Rahim bin Ismail ('PW1') of the incident, together with Insp Mohammad Afdhal bin Mat Saupi ('PW4'), ASP Ahmad Zamry bin Marinsah ('PW11') and several other police personnel rushed to the scene of crime and arrived at that place at about 5.20pm. On arrival, PW6 saw blood spots on the road and a male Chinese (the respondent) who was standing about 25 meters from the scene of crime. The respondent was quiet and did not show any aggressive reaction nor attempt to run away. He had a sling bag (exh P8A) worn over his shoulder and his shirt and trousers were smeared with blood. There were blood stains on both of his hands as well. PW6 told the accused to open his sling bag and when he opened it, PW6 saw a pair of scissors (exh P7A1) with broken handle and blood stains on its blades. Both the scissors as well as the bag were seized by PW6 and the respondent was arrested.

[5] PW11 who carried out an investigation into this case testified that the incident at the amusement centre involved three male Chinese and resulted in the death of one of them namely the deceased whilst another person, one Wong Ren Kect ('Wong') was treated at Kluang Utama Specialist Hospital as he had suffered injuries on his hand and leg.

[6] The statement recorded from Wong (exh P31) under s 112 of the Criminal Procedure Code shows that whilst he was doing his work, the respondent suddenly came and wanted to apprehend a customer. But Wong told him not to do it as they were carrying on business and told him to rest first. The respondent then left. Wong was talking to one Tham Kok Wai ('Tham') when the respondent came back to the place where Wong was sitting and punched his head. The respondent stabbed Wong on his left hand with the scissors. When Wong pushed the respondent away, the respondent came back and as he was about to stab Wong's stomach, Wong then kicked the respondent but his left foot hit the scissors. In the subsequent events, the deceased came and spoke to the respondent saying 'U apasal, jangan ini macam' to which the respondent replied 'U mahu tolong Xian Jie (Wong)'. The deceased ran out of Song Mart Supermarket when the respondent wanted to stab him. The evidence also shows that when Wong was taken to the hospital he could see the deceased lying on the road in a pool of blood.

[7] Tham in his statement pursuant to s 112 of the Criminal Procedure Code (exh P32) apart from giving his own narrative of the incident consistent with the statement in exh P31, also stated that he saw the deceased lying on the road with the respondent standing whilst holding the bloodied scissors with broken handle.

[8] The postmortem report (exh P23) and the evidence of Dr Mohamad Aznool Haidy bin Hj Ahsorori (PW7), the pathologist, who performed the

A autopsy on the deceased, attributed the deceased's death to the stab wound to the chest which severed both the right lung and liver caused by a sharp object such as a knife or a pair of scissors.

B **[9]** The evidence of Nur Hafiza bt Md Yusof (PW8) a scientific officer in the service of the Department of Chemistry, Malaysia who amongst others analysed the broken scissors bearing stains indicative of blood, the swab stick (L2) containing stains indicative of blood and the bloodstained specimen 4 (labelled Chow Chin Wei) shows that the DNA profile derived from the indicated bloodstains on the pair of scissors and swab (L2) matched each other C and with the DNA profile derived from the bloodstained specimen 4 belonging to the deceased.

[10] The learned trial judge also admitted in evidence pursuant to s 32(1)(i) D of the Evidence Act 1950, the statements of Wong and Tham (exhs P31 and P32) upon being satisfied that the conditions stipulated in the said section had been fulfilled by the prosecution. PW11 in this respect, according to the learned judge, had taken all reasonable steps to secure the presence of Wong and Tham in court as witnesses, however it was of no avail as their whereabouts E could not be traced or were unknown. At the close of case for the prosecution, the learned judge considered the statements of Wong and Tham and accepted it as the truth. There was nothing in both statements which contradicted the proven facts and indeed these statements were corroborated in material particulars by the facts already established. According to the learned judge, he F found no reasons not to rely on the statements to prove the fact that the respondent had caused hurt to Wong and that the respondent was the last person with the deceased when he was still alive.

G **[11]** Upon undertaking a maximum evaluation of the prosecution's evidence, the learned judge made the following findings:

(a) the first element of the offence under s 302 of the Penal Code that the deceased was dead was not disputed;

H (b) the second element needed to be proved by the prosecution was that the death of the deceased was caused by the act of the respondent. The learned judge accepted the irrefragable evidence of PW7 that the deceased died due to the stab wound on the chest which severed the right lung and lever;

I (c) the prosecution relied on the circumstantial evidence led through PW4, PW6 and PW12, exhs P31 and P32. The evidence that could be gleaned from their testimony and exhs P31 and P32 revealed that both Wong and Tham saw the respondent chasing the deceased inside the premises when the deceased ran towards the door of the supermarket;

(d) Wong, Tham and PW12 saw the deceased lying on the road;

(e) Tham saw the respondent standing holding the pair of broken scissors smeared with blood;

(f) the respondent was still at the scene of crime when PW4 and PW6 arrived. PW6 saw blood on the road and traces of blood stains on both the respondent's hands as well as his shirt and trousers;

(g) PW6 seized the scissors from the accused;

(h) the DNA profile derived from the blood stains on the scissors matched with the DNA profile of the deceased; and

(i) the above circumstantial evidence conclusively proved the second element of the offence that the death of the deceased was caused by the act of the respondent.

[12] On the third ingredient of the offence, the learned judge correctly stated that the act of the respondent in causing the deceased's death must fall within any of the four limbs of s 300 of the Penal Code. The learned judge found that the act by which the death was caused was done with the intention of causing the bodily injury in question to the deceased and such bodily injury was sufficient in the ordinary course of nature to cause death, holding therefore that the respondent's act fell within limb (c) of s 300 of the Penal Code. Consequently, the learned judge decided that the prosecution had successfully established a prima facie case against the respondent on the charge under s 302 of the Penal Code and called upon the respondent to enter on his defence on this charge.

[13] So far as it concerns the charge under s 324 of the Penal Code, the learned judge was also satisfied that it was the respondent who had voluntarily caused hurt by using the scissors to Wong consisting of injuries on his left arm and leg measuring 2cm x 2cm and 2cm long respectively. A prima facie case was therefore established against the respondent on this charge, hence, the respondent was ordered to enter his defence on this charge.

[14] Based on the respondent's testimony, we could easily discern the defence pattern in this case in that the murder of the deceased occurred when both Wong and the deceased were alleged to have accused the respondent of stealing money belonging to the amusement centre and that if he did not return the money they would go to his house, disturb his sister and the members of his family and they would rape his mother. The exact words which the respondent used in his testimony are reproduced below:

> *Xiao Jie dan Fei Mao tuduh saya mencuri wang dan mereka kata* jika saya tidak serahkan balik wang, mereka akan pergi ke rumah saya, kacau adik saya dan ahli

keluarga saya. Xiao Jie dan Fei Mao ada marah ibu saya dalam perkataan 'ingin merogol ibu saya'. (Emphasis added.)

The respondent, upon hearing these alleged provocative words was very angry and hence the fight started. During the fight, the deceased hit the respondent. He however did not know that he was the one who had caused injuries to Wong and the deceased. Neither did the respondent know that he used the scissors to hurt Wong and that as he was under the influence of drug the respondent did not know where he got the scissors from. He further said that he did not know what he had done to the deceased. A little later in his testimony, the respondent changed his testimony when he said:

Fei Mao kata saya curi wang dan jika saya tidak kembalikan wang dia akan pergi rumah saya kacau adik saya dan ahli keluarga saya. Fei Mao juga ada marah ibu saya dalam perkataan 'ingin merogol ibu saya'. (Emphasis added.)

[15] Further in his testimony, the respondent testified that he only knew the deceased was injured when he saw the deceased lying in front of the entrance to the amusement centre in a pool of blood. He asked his sister Sah Tase Li (DW3), who happened to pass by the scene of crime, to take the deceased to the hospital but she declined to help. The respondent also sought help from members of public but was to no avail. With regard to the sling bag (exh P8A1), the respondent denied carrying it and did not know its contents. Cross-examined by the learned deputy public prosecutor, the respondent admitted that he did not have a good relationship with his family. However, when it was suggested to him that due to the strained relationship with his family he had no reason to be angry with the deceased when he allegedly uttered some words to him, the respondent replied 'saya tidak tahu'. He also replied 'saya tidak tahu' to the suggestion that if it was true that he was angry with the deceased and Wong, he reacted by stabbing both of them with the scissors. In summary, almost every question during the respondent's cross-examination was met with the terse reply of 'saya tidak tahu'.

[16] The defence had also tendered the respondent's statement recorded under s 112(iv) of the Criminal Procedure Code as exh D33. Differences, we would say, are clearly discernible on careful scrutiny of the respondent's statement and his evidence during the trial. We now quote from the statement, the relevant answers, more of which will be elaborated in due course, which the respondent had given to the questions asked by the recording officer:

S: Adakah kamu ada membawa sebuah beg hitam dan menyilang pada badan kamu?

J: *Sudah lupa*

...

...

...

S: Adakah kamu mengaku telah menikam simati dengan menggunakan senjata gunting?

J: *Ada*

...

...

...

S: Sebab marah dan punca kamu telah menikam simati?

J: Sebab marah mak saya. Cakap mahu pergi rumah kacau mak. *Mahu main saya punya adik*.

...

...

...

S: Adakah kamu berselisih faham dengan Pei Mau dan Wong Ren Kect?

J: Pei Mau sama Wong Ren Kect. *Wong Rec Kect ada cakap saya curi wang kedai. Pei Mau cakap mahu datang rumah datang kacau keluarga saya dan main sama adik.* (Emphasis added.)

[17] The defence led evidence through Dr Ian Lloyd a/l Anthony ('DW2'), a psychiatrist to the effect that the respondent was not suffering from any major or serious mental illness. However, the respondent suffered from intellectual incapacity or deficiency which started since he was a child. A person suffering from intellectual disability when provoked would react in hasty manner and in this particular case, DW2 added, the respondent reacted hastily without any plan and as a result of his anger he could not decide rationally and could not control his emotion after the provocation. DW2 also prepared a report (exh D34) which was consistent with his own oral testimony. The learned judge accepted the evidence of the respondent and his defence of provocation proceeding from both the deceased and Wong.

[18] The reason according to His Lordship, was that the defence was unable to put questions or suggest to Wong and Tham during the prosecution case relating to the alleged provocation as they could not be found. Consequently, the learned judge held, the only version before the court was that the act of the respondent in causing hurt to Wong and stabbing the deceased resulting in his death was due to provocation from both the deceased and Wong. The evidence of DW2 that the respondent was suffering from intellectual incapacity was accepted by the learned judge. The words uttered by the deceased to the

respondent who was suffering from such incapacity was held to constitute grave and sudden provocation and the respondent was in the result deprived of the power of self control by such provocation. The learned judge accordingly found that for the charge under s 302 of the Penal Code, the respondent had succeeded in proving the provocation under Exception 1 to s 300 thereof.

[19] The learned judge additionally found that the prosecution had failed to prove beyond reasonable doubt that the respondent had the intention to cause the deceased's death. The respondent's action and conduct immediately after the incident showed that he did not intend to kill the deceased. The learned judge in this connection considered the evidence that the respondent was still at the scene of crime, he did not run away and he sought help from DW3 and members of the public holding that this conduct was consistent with his innocence. In the event, the respondent was found guilty of the lesser offence of culpable homicide not amounting to murder under s 304(a) of the Penal Code and was accordingly sentenced to 18 years imprisonment with effect from the date of his arrest. As regards the charge under s 324 of the Penal Code, the learned judge convicted the respondent under s 334 of the Penal Code and sentenced him to one month imprisonment. Both sentences were ordered to run consecutively.

[20] Before we embark upon a detailed consideration of the appeal, it is necessary to draw attention to one aspect of the proceedings which at this juncture requires emphasis. The point is that the prosecution appeals against the decision of the learned judge in respect of both charges. However, during the hearing of the appeal before us, one thing is very clear. The learned deputy public prosecutor only submitted on the appeal relating to the charge under s 302 of the Penal Code driving home the point that there was no provocation and that the respondent's act by which the deceased's death was caused was done with the intention of causing the bodily injury sufficient in the ordinary course of nature to cause the death of the deceased. Our perusal of her written submission also shows that her argument merely centres on the issue of the alleged provocation under Exception 1 to s 300 of the Penal Code which is a special exception available as a defence to the charge of murder. It is therefore safe for this court to assume that the prosecution has abandoned its appeal against the reduction by the learned judge of the charge for an offence under s 324 to an offence under s 334 of the Penal Code.

[21] The position adopted by the respondent is that the finding of grave and sudden provocation which emanated from the deceased and Wong justified the reduction of the charge under s 302 of the Penal Code to one under s 304(a) thereof. The respondent had in his evidence and statement alluded to the fact that he was provoked by the deceased before the said attack. DW2, the expert witness, found the respondent to be intellectually incapacitated which

condition had a direct impact on his mental state when provoked. The respondent also complained that the prosecution failed to call Wong and Tham to testify as a result of which the respondent was deprived of the opportunity of challenging them by putting to them the defence of provocation in the course of the trial and that the prosecution was unable to rebut the respondent's version that he was provoked.

[22] It is apparent, therefore, that the critical question which immediately arises in this appeal is whether the respondent, by grave and sudden provocation given by the deceased and Wong, had caused the death of the deceased. Simply put, was there any such evidence of provocation upon which the learned judge could be said to be justified in reducing the charge under s 302 of the Penal Code to one under s 304(a) of the said Code. Herein thus lies the only pertinent question for our determination. We would start off by stating the obvious, that under the Penal Code, the defence of provocation is not included in Chapter IV therein which deals with general exceptions. The trite law is that where an act committed by an offender falls within the general exceptions, such act does not constitute an offence. But the defence of provocation is a special exception which an offender can avail himself of such defence where he is accused of committing murder under s 302 of the Penal Code. The inevitable consequence is that where provocation is successfully proved in a charge for homicide under s 302 of the Penal Code, the said homicide is not murder. Instead, the act in question is culpable homicide not amounting to murder which is an offence under s 304 of the Penal Code. As far as we are able to discern, upon proof of such defence, it does not absolve the offender completely of the crime as with an act which falls within the category of general exceptions.

[23] We may venture to add that the law, as it is clear to us, recognises an act of provocation as a valid defence in homicide cases because there is a distinction between intentional killing in hot blood and intentional killing when the blood is cool. Coke, 1 Hale PC 451 (as quoted in *Indian Penal Code* Prof SN Misra at p 490) succinctly explained the distinction stressing that the former was killing in provocation and was considered to be a less heinous kind of homicide than the latter one done by a man who was in possession of his self control. Under Exception 1 to s 300 of the Penal Code, it is provided that:

> culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

[24] It is clear beyond argument from the wording of the exception that in order that provocation may be raised in defence to a charge of murder the following conditions must be established:

(a) there must be provocation;

(b) the provocation must be sudden and grave;

(c) by reason of such grave and sudden provocation, the offender must have been deprived of the power of self control; and

(d) the death of the person who gave the provocation or the death of any other person, by mistake or accident, must have been caused.

[25] It is also useful and informative to express our understanding of the common law position on this subject. The English common law requires four conditions before an offender may avail himself of the defence of provocation. These are:

(a) it must be sufficient to deprive a reasonable man of his self control, so that he might be considered as not being at the moment 'the master of his own understanding';

(b) the fatal blow must be clearly traced to the passion arising from that provocation;

(c) the mode of resentment must be a reasonable relationship to the provocation; and

(d) there must not have been sufficient time between occurrence of the provocation and the killing for the accused's blood to cool and for reason to resume its seat (see *R v Hayward* (1833) 6 C & P 157).

[26] We would additionally say on this aspect that, by way of an explanation to Exception 1, the Penal Code clearly states that whether the provocation is grave and sudden enough to prevent the offence from amounting to murder, is a question of fact. Thus the law, we apprehend, is that, the question whether the provocation is sudden and grave would necessarily have to be determined according to the facts and circumstances of each case by the trial court. Now, in dealing with the issue of provocation in this case, taking the first condition as specified above, the convenient starting point is for the learned judge to consider whether there was provocation given by the deceased and Wong to the respondent which resulted in the respondent to inflict that fatal injury on the deceased. It is also necessary to remember that the learned judge accepted the respondent's version that he was provoked by Wong and the deceased simply because the defence could not put their version to both Wong and Tham. The defence, the learned judge said, could not cross-examine both of them on the reasons as to why the respondent had caused hurt to Wong and chased the deceased which led the respondent to subsequently stab the deceased. It bears repeating that Wong and Tham could not be produced in court to testify as they could not be traced. Instead their statements under s 112 of the Criminal Procedure Code were tendered by the prosecution and admitted in evidence by

the learned judge as exhs P31 and P32 pursuant to s 32(1)(i) of the Evidence Act 1950.

[27] It ought to be mentioned that the learned judge accepted the respondent's testimony that he was provoked but one point which clearly emerges as an issue before this court is that His Lordship completely omitted to consider and scrutinise the alleged words uttered by Wong and the deceased which he found to amount to a provocation. In law, we accept that provocation may be caused by words and gestures (*Madhavan v State of Kerala* AIR 1966 Ker 258; 1966 Ker LT 112). In this case, the defence relies on the provocation of words but it seems to us that upon perusal of the grounds of judgment, nowhere did the learned judge scrutinise the alleged words uttered by the deceased and Wong. For convenience, we reproduce the exact words which the respondent had alleged to be provocative:

> *Xiao Jie dan Fei Mao tuduh saya* mencuri wang dan *mereka kata* jika saya tidak serahkan balik wang, *mereka* akan pergi ke rumah saya, *kacau adik saya dan ahli keluarga saya. Xiao Jie dan Fei Mao ada marah ibu saya dalam perkataan 'ingin merogol ibu saya'*. (Emphasis added.)

When he was further examined by his counsel on this point, the respondent said:

> *Fei Mao kata* saya curi wang dan jika saya tidak kembalikan wang dia akan pergi rumah saya kacau adik saya dan ahli keluarga saya. *Fei Mao* juga ada marah ibu saya dalam perkataan 'ingin merogol ibu saya'. (Emphasis added.)

[28] We can easily detect a serious difference in the above evidence. The respondent initially testified that it was both the deceased (Fei Mao) and Xiao Jie (Wong) who used the alleged provocative words. Later, he did an about-turn when he testified that it was the deceased who uttered those words. We note that the respondent did not put forward any explanation on the complete change of his stance. The point to be made is that if both the deceased and Wong uttered those words, both of them could not have said the same thing or used the same words simultaneously to the respondent. Or did they use the same words at different time. We could not however hazard a guess on the manner in which these alleged provocative words were uttered. There was no explanation on how these words were spoken by Wong and the deceased. There is clearly a serious contradiction in the evidence of the respondent relating to the person who allegedly uttered the alleged provocative words.

[29] Further serious contradiction can be seen when the above contradictory evidence is considered in the light of the respondent's statement (exh D33). The respondent in fact made another about-turn when he said in the cautioned statement:

A Sebab marah mak saya. Cakap pergi rumah kacau saya mak. *Mahu main saya punya adik*. (Emphasis added.)

This was said in answer to the question 'Apakah sebab dan punca kamu telah menikam si mati'. The respondent further said:

B Fei Mau sama Wong Ren Kect. *Wong Ren Kect ada cakap saya curi wang kedai. Fei Mau cakap mahu datang rumah datang kacau keluarga saya dan main sama adik*. (Emphasis added.)

C What has become apparent from the scrutiny of the above evidence is that the respondent's oral testimony and his cautioned statement are pregnant with serious contradictions which can be enumerated as follows:

(a) in his evidence the respondent alleged that it was the deceased and Wong D who spoke the alleged provocative words;

(b) he later said, upon being examined further by his learned counsel, that it was the deceased who uttered the words in question;

E (c) in his cautioned statement however, the respondent initially said that the deceased 'marah mak saya', he would go to the respondent's house to disturb his mother and 'mahu main saya punya adik', meaning, he wanted to have sex with the respondent's sister but nowhere did the respondent state that the deceased said he would rape his mother. On the contrary, in his oral evidence the respondent testified that the deceased F and Wong said that they would go to his house '... kacau adik saya dan ahli keluarga saya ... marah ibu saya dalam perkataan 'ingin merogol ibu saya". A moment later in his evidence, the respondent testified that it was the deceased who spoke these impugned words. It ought to be emphasised that the respondent's statement does not contain these G words, it is totally different from the respondent's oral testimony; and

(d) the respondent in his statement caused further contradiction when he stated that it was Wong who accused him of stealing money whilst the deceased was alleged to have said that he would go to the respondents' H house to disturb his family and have sex with his sister. This evidence is significantly in complete departure from the respondent's oral testimony and his earlier statement. Simply put, now the respondent is saying that Wong and the deceased each said different things, it was Wong who accused the respondent of stealing the money and that the deceased said I he would go to the respondent's house to disturb the members of his family and to have sex with his sister. Nowhere did he mention that the deceased and Wong said that they would rape his mother as he initially alleged in his oral evidence.

[30] The grounds of judgment of the learned judge as well as the records of the proceedings do not indicate that His Lordship had undertaken a proper, adequate and correct judicial appreciation and scrutiny of the entire evidence on the crucial issue of provocation in order to ascertain the truth of the matter. This court in the case of *Pendakwa Raya lwn Mr Losali dan satu lagi dan rayuan lain* [2009] 6 MLJ 54; [2010] 8 CLJ 560 explained the law on the role of an appellate court in dealing with findings by a trial judge which depended on an assessment of credibility and reliability of a witness wherein it was held by Raus JCA (as His Lordship then was) that such findings should not be reversed by the appellate court unless it could be shown that the decision was against the weight of evidence or a misdirection had occurred that had caused an injustice. That we think emphasises the time-honoured principle that unless it can be shown that such findings by the learned judge suffer from some serious errors or omissions, or against the weight of evidence or unless we can find substantial or compelling reasons for disagreeing with that findings, this court shall not interfere with such findings of facts by the learned trial judge (*Dato' Yap Peng v Public Prosecutor* [1993] 1 MLJ 337; *Public Prosecutor v Munusamy* [1980] 2 MLJ 133; *Public Prosecutor v Vijaya Raj* [1981] 1 MLJ 43; *Timhar Jimdani Ong & Anor v Public Prosecutor* [2010] 1 MLJ 775; [2010] 3 CLJ 938; *Nasaruddin bin Daud & Anor v Public Prosecutor and another appeal* [2010] 6 MLJ 35; [2010] 8 CLJ 21).

[31] The above principle is salutary reminder to us that where a trial judge had misdirected himself in assessing material evidence and such misdirection had caused a miscarriage of justice, it would be justified for this court sitting on appeal to reject the finding made by him. In fact, in this particular case, the learned judge had omitted to scrutinise the evidence completely. Had the learned judge done so, His Lordship would have noticed these serious discrepancies that would in our view be certain to decide the fate of the respondent's defence of provocation as one that is lost in a morass of contradictions and ambiguities and is thus without any scintilla of truth. Thus, we hold that the first condition for Exception 1 to apply has not been fulfilled. It ought to be emphasised that the respondent's defence is not supported by any other evidence. It would not be sufficient therefore to act on his words which are full of irreconcilable inconsistencies. In our judgment, in view of these discrepancies, it would be wholly unsafe to act on the evidence and hold that there was provocation emanating from Wong and the deceased so that the fatal blow that caused the death of the deceased could be traced to the passion arising from that provocation. It would be appropriate under the circumstances to conclude that, for the reasons which we have alluded to, the learned judge had erred in misapprehending the law and material evidence in finding that the act of the respondent was due to the provocation given by Wong and the deceased. The plea of provocation is, in our finding, one which is imminently smacked of unpalatable defence.

[32] Under s 105 of the Evidence Act 1950, the burden of proving the existence of circumstances bringing the case within any special exception such as Exception 1 to s 300 of the Penal Code is upon the respondent. The law imposes this burden of proving the existence of these circumstances upon a person accused of the offence. It is also stipulated in s 105 that the court shall presume the absence of these circumstances. Thus, if the defence of provocation is to succeed, there must be something to support it, either something in the prosecution evidence or some evidence given by the defence which is capable of making it out (*Looi Wooi Saik v Public Prosecutor* [1962] 1 MLJ 337). The burden of proving the circumstances in s 105 is on the accused. It is settled law that in criminal proceedings where there is a burden on the accused, it is no higher than that of a party on a civil proceeding, that is to say, on the balance of probabilities (*Lee Chin Hock v Public Prosecutor* [1972] 2 MLJ 30 (FC); *Lee Thian Beng v Public Prosecutor* [1972] 1 MLJ 248 (FC); *Loo Hwee Hong v Public Prosecutor* [1978] 2 MLJ 164; *Akin Khan bin Abdul Rahman v Public Prosecutor* [1987] 2 MLJ 217; *Public Prosecutor v Lee Poh Chye & Anor* [1997] 4 MLJ 578; and *Public Prosecutor v Awang Raduan bin Awang Bol* [1998] 5 MLJ 460).

[33] From a perusal of the statements of Wong and Tham (exhs P31 and P32) there is not a scrap of evidence about the alleged provocation. It will be remembered that Wong in his statement (exh P31) stated that whilst he was doing his work, the respondent suddenly came and he wanted to apprehend a customer. But Wong told him not to do it as they were doing business. The respondent then left but suddenly returned to the place where Wong was sitting and hit his head. This was witnessed by Tham. The fight then started with the respondent using the scissors. The deceased came and spoke to the respondent 'U apasal, jangan ini macam', to which the respondent replied, 'U mahu tolong Xiao Jie' (Wong). When the respondent wanted to stab the deceased, he ran away. This statement is supported by Tham's statement (exh P32). The learned judge at the close of the case for the prosecution correctly accepted that both statements contained the truth consistent with the facts which had been proved after considering the evidence of PW6 who seized the scissors, the evidence of PW8 who confirmed that the blood stains found on the scissors belonged to the deceased and the evidence of PW7 who confirmed that the stab wounds on the deceased's body could have been caused by the scissors and the injury sustained was fatal in nature. We agree that Wong and Tham could not be cross-examined on the issue of provocation as they could not be traced. But we would also observe that the defence did not cross-examine the investigation officer (PW11) on the same issue of provocation.

[34] In our judgment, the defence fails to discharge the burden of proving the existence of the circumstances bringing the case within Exception 1 of s 300

on the balance of probabilities. There is not, we would say, a shred of evidence with which any such defence could be even remotely linked up to the defence of grave and sudden provocation. The argument of the respondent which we may now consider focuses on the issue of the respondent's intellectual incapacity which according to DW2 had a direct impact on his mental state when provoked. We would in this connection observe that DW2 in his testimony told the court that the respondent was not suffering from any major mental illness. He only suffered from intellectual disability which made the respondent react hastily when provoked and that as a result of his anger he could not decide rationally and could not control his emotion after the provocation. Since this issue is linked to the defence of provocation and that our finding is that the defence fails to prove provocation, we think that it is no longer necessary for this court to delve into this argument as it has consequently become a red herring. Neither is it necessary for the like reason, for this court to consider the remaining conditions for Exception 1 to apply, that is that, whether the provocation was sudden and grave as to deprive the respondent of the power of self control when he caused the death of the deceased. Thus, the defence of provocation collapsed.

[35] The next point of importance which the learned counsel has raised before this court is that the prosecution failed to call the two material witnesses namely Wong and Tham. The learned judge had admitted in evidence their two statements pursuant to s 32(1)(i) of the Evidence Act 1950 despite the protest of counsel for the respondent upon being satisfied that the prosecution had made adequate and reasonable efforts to trace them but were of no avail. His Lordship also accepted the contents of the statements as the truth as the same were consistent with the proven facts. We are satisfied that sufficient evidence was adduced to justify His Lordship's admission of the statements under s 32 of the Evidence Act 1950 (see *Da Duncan v Public Prosecutor* [1980] 2 MLJ 195). Apart from these statements, the learned judge had also accepted the evidence of PW6, PW7 and PW8 which we have already deliberated above. The evidence is without doubt sufficient to justify the findings made by the learned judge and when considered together with the two statements collectively, the learned judge was perfectly entitled to call for the defence on the charge of murder.

[36] Now, in the absence of any evidence relating to provocation, the only question for this court to consider is therefore whether we are satisfied beyond reasonable doubt that the respondent had committed the offence of murder for which he is charged (*Tan Buck Tee v Public Prosecutor* [1961] 1 MLJ 176). The learned judge found that the respondent's act fell within limb (c) of s 300 of the Penal Code which states in terms that culpable homicide is murder 'if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause

death'. Stating the law very generally, a perusal of s 300 itself plainly shows that in all homicide cases the question of intention of the accused person in doing the act which is the cause of death is of fundamental importance. A consideration of the Federal Court's decision in *Tan Buck Tee*, confirms this court in the view which has been expressed and revealed that in all cases, that intention is something the existence and the nature of which are to be deduced from the evidence. That, we think lets in a pertinent question as to whether the learned judge is correct in arriving at the above conclusion.

[37] In his judgment, the learned judge correctly found that the death of the deceased was caused by the respondent's act. The learned judge accepted the undisputed evidence of PW7 that the deceased died due to the stab wound on the chest which severed the right lung and lever. The prosecution relied on the circumstantial evidence to prove its case against the respondent. The events leading to the death of the deceased at the hands of the respondent were described by Wong and Tham in their statements recorded under s 112 of the Criminal Procedure Code which we have already highlighted earlier. The learned judge accepted the contents of the statements as the truth. The respondent wanted to stab the deceased who then ran away pursued by the respondent. This was witnessed by both Wong and Tham who also a little later saw the deceased sprawled on the road outside the premises whilst the respondent was standing, the bloodied scissors with broken handle in his hand. This was also witnessed by PW12. When PW4 and PW6 arrived at the scene of crime, the respondent was still there and the scissors was seized from him by PW6. The DNA profile derived from the blood stains on the scissors were confirmed by PW8 and her report (exh P) to match with the DNA profile of the deceased. This circumstantial evidence proves conclusively that it was the respondent who inflicted the fatal injury on the deceased.

[38] The learned judge found the body of the deceased with seven appalling injuries on it, one of which was the stab wound 13cm deep which penetrated the chest and severed the right lung and liver. This injury in our opinion must have been caused by violent act with such intensity that it had resulted in the lever and lung being severed. In the absence of anything else, the respondent must have intended to inflict that bodily injury on the deceased which is sufficient in the ordinary course of nature to kill the deceased on whom the injury was inflicted. PW7's testimony confirms that this is the fatal injury that led to the deceased's death. The injury was in our view inflicted on the vital part of the body affecting in consequence the vital organs namely the liver and the lung as a result of the attack. Accordingly, we are in full agreement with the learned judge that the respondent's act falls squarely within limb (c) of s 300 of the Penal Code.

[39] With the rejection of the defence of provocation, we have to now

consider the rest of the defence evidence. Having scrutinised the respondent's evidence, we find that his defence is one of a complete denial of the killing. Anything that would be against him, he would simply deny any knowledge. Even when he was asked about the scissors and the sling back, he would steer clear on any link to it, indeed anything that would implicate him to the offence would be met with a flat denial from the respondent. In his evidence, the respondent claimed that he did not know that he was the one who had caused injuries to Wong and the deceased. The respondent also claimed that he did not know where he got the scissors from and what he had done to the deceased. He testified that he only knew the deceased was injured when he saw the deceased outside the premises lying in a pool blood. He requested his sister (DW3) to send the deceased to the hospital. When his request was declined he sought help of the members of the public to send the deceased to the hospital. He also denied carrying the sling back (exh P8A). Cross-examined by the learned deputy public prosecutor his answers were mostly 'saya tidak tahu'. However in his cautioned statement which we have highlighted earlier, he admitted to stabbing the deceased but stated that he forgot whether he brought the sling bag.

[40] In *Tan Buck Tee*, the Federal Court in the judgment of Thomson CJ held that having regard to the prosecution evidence and to the defence being a complete denial of all knowledge of the killing, the case was one of murder or nothing. Likewise in this case, in our judgment, it is apparent on a careful perusal of the prosecution evidence and the defence of utter denial of the killing, we are satisfied that following our finding that the burden of proving the defence of provocation in accordance with s 105 of the Evidence Act 1950 has not been persuasively discharged, the respondent ought therefore to be convicted under s 302 of the Penal Code. It must be emphasised that the defence has submitted that the learned judge was justified in reducing the charge from an offence under s 302 to one under s 304(a) as His Lordship accepted the defence of provocation. We are satisfied that since such defence has been rejected by this court for the reasons earlier given and that there is no suggestion that, notwithstanding our findings, a case under s 304(a) has been made out by the evidence, we are justified in our conclusion that the prosecution has proved that the respondent had committed the offence with which he is charged beyond reasonable doubt.

[41] Further mention must now be made at this juncture. The respondent despite in his oral testimony, denying knowledge that he killed the deceased, in his statement he admitted to stabbing the deceased. This is a material contradiction which we ought to take into account. His denial would mean that his defence was that he did not kill the deceased. But such denial is not sufficient to secure a verdict of an acquittal in the absence of any evidence to explain or justify such denial. A mere denial is not sufficient to cast any

reasonable doubt in the prosecution case. We therefore dismiss such denial and the respondent's defence as a mere afterthought. It is more probable, based on the respondent's admission in the cautioned statement that he stabbed the deceased which in our opinion lends credence to the prosecution case that it was the respondent's deliberate act of stabbing the deceased that had caused the deceased to die.

[42] Thus, in the end, for the reasons that we have given, we hold that the learned judge had made an error of law and on the fact when, following the finding of sudden and grave provocation, His Lordship reduced the charge from an offence under s 302 to one under s 304(a) of the Penal Code. Under the circumstances, we allow the appeal and set aside the order and decision of the High Court. The respondent is found guilty of an offence under s 302 of the Penal Code and is sentenced to death.

Order accordingly.

Reported by Ashok Kumar